

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANNIE COLE (#200962),

Plaintiff,

CASE NO. 2:14-CV-11325
JUDGE NANCY G. EDMUNDS
MAGISTRATE JUDGE PAUL J. KOMIVES

v.

BENJAMIN MAULDIN,
ANN WARD,
T. MARSHALL,
RICHARD STAPLETON,
MELISSA GODFREY and
WIXON,

Defendants,

**ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION TO APPOINT
COUNSEL (Doc. Ent. 2) and DIRECTING THE U.S. MARSHAL TO ATTEMPT
SERVICE UPON DEFENDANTS STAPLETON AND ZELLER AT THE MDOC**

A. Plaintiff has filed an amended complaint naming only Mauldin, Ward, Stapleton and Zeller as defendants.

Plaintiff Annie Lee Cole (#200962) is currently incarcerated at the MDOC's Women's Huron Valley Correctional Facility (WHV) in Ypsilanti, Michigan. *See* www.michigan.gov/corrections, "Offender Search." On March 24, 2014, while incarcerated at WHV, plaintiff filed this case against six (6) defendants: B. Mauldin, Ann Ward, T. Marshall, Richard Stapleton, Godfrey and Wixon. Doc. Ent. 1 ¶¶ 4-9.

On April 7, 2014, plaintiff filed an amended complaint against four (4) defendants: B. Mauldin (Reviewing Officer), Ann Ward (Hearings Investigator), R. Stapleton (Hearings

Administrator) and M. Zeller (Hearing Officer). Doc. Ent. 5 ¶¶ 4-7; *see also* Doc. Ent. 5 at 12, 13, 14, 15, 21. Thus, T. Marshall, Godfrey and Wixon are no longer defendants in this case.¹

The facts underlying plaintiff's amended complaint begin on August 6, 2010 - the date plaintiff received a Major Misconduct Report for Disobeying a Direct Order (*see* Doc. Ent. 5 at 12) - and conclude on March 23, 2011 - the date the charge was dismissed (*see* Doc. Ent. 5 at 13). Doc. Ent. 5 ¶¶ 9-22.

B. Stapleton and Zeller have yet to appear.

Plaintiff is proceeding in forma pauperis. Doc. Ent. 9. The Court has entered an order (Doc. Ent. 10) directing service without prepayment of costs and authorizing the U.S. Marshal to collect costs after service is made. On May 30, 2014, the U.S. Marshal acknowledged receipt of documents for service of process upon seven (7) defendants (Mauldin, Ward, Wixon, Godfrey, Marshall, Stapleton and Zeller), each with an address at WHV. Doc. Ent. 11.

Mauldin, Ward and Godfrey returned executed waivers of service. Doc. Entries 13, 14 and 16. Wixon, Marshall, Stapleton and Zeller's waivers were returned unexecuted, each on the basis that they were not employed at WHV. Doc. Entries 15, 17-19. Thus, on August 12, 2014,

¹The filing of an amended complaint nullifies or supercedes the original complaint. *See Drake v. City of Detroit, Michigan*, 266 Fed.Appx. 444, 448 (6th Cir. 2008) ("Although Drake pleaded a claim for abuse of process in his original complaint filed in state court, that complaint is a nullity, because an amended complaint supercedes all prior complaints."); *Smith & Nephew Inc. v. Federal Ins. Co.*, 113 Fed.Appx. 99, 102 (6th Cir. 2004) ("Rule 15 does provide that an amended complaint supercedes an original complaint with respect to which allegations and issues are presented to the court for disposition[.]").

That plaintiff's April 7, 2014 amended complaint names only four (4) defendants is confirmed by the case caption (Doc. Ent. 5 at 1) and the list of defendants (Doc. Ent. 5 at 2 ¶¶ 4-7). *See also* Fed. R. Civ. P. 10(a) ("Caption; Names of Parties.").

orders were entered directing the MDOC to provide the U.S. Marshal with addresses for service upon Marshall, Stapleton, Zeller and Wixon. Doc. Entries 23, 24, 25, 26.

The U.S. Marshal has acknowledged receipt of documents for service of process upon Marshall and Stapleton. Doc. Entries 27 and 30. By a letter dated August 13, 2014 to the U.S. Marshal, the MDOC informed that it was “unable to provide any information on Defendant Wixon as identified.” Doc. Ent. 28.

To date, Stapleton and Zeller have not appeared.

C. Currently, there are three (3) pending motions in this case.²

1. On March 24, 2014, at the same time she filed her original complaint (Doc. Ent. 1), plaintiff also filed a motion to appoint counsel pursuant to 28 U.S.C. § 1915(e)(1). Doc. Ent. 2. Among other things, plaintiff claims that she “has limited access to the law library[,]” and “is unable to contact material witnesses as they have been paroled and/or retired since the events of this case.”

2. On July 22, 2014, MDOC defendants Mauldin, Ward and Godfrey filed a motion to dismiss (Doc. Ent. 21) with regard to plaintiff’s amended complaint (Doc. Ent. 5). Plaintiff’s response was due on or before September 2, 2014. Doc. Ent. 22.

3. On September 2, 2014, plaintiff filed a motion (Doc. Ent. 29) for leave to file an amended complaint. Doc. Ent. 29 at 1-3. Attached to the motion is a proposed second amended complaint, which names seven (7) defendants: Benjamin Mauldin, Ann Ward, Melissa Godfrey, T. Marshall, Wixon, Richard Stapleton and Zeller. Doc. Ent. 29 at 4-12, 31-32; *see also* Doc. Ent. 29 at 13-30 (Exhibits A-E).

²Judge Edmunds has referred this case to me for pretrial matters. Doc. Ent. 12.

On September 15, 2014, MDOC defendants Mauldin, Ward and Godfrey filed a response.
Doc. Ent. 31.

D. Order

Upon consideration, the U.S. Marshal is DIRECTED to attempt service upon Hearings Administrator R. Stapleton and Hearing Officer M. Zeller at the MDOC (206 E. Michigan Ave., Grandview Plaza, PO Box 30003, Lansing, MI 48909).

Moreover, plaintiff's March 24, 2014 motion to appoint counsel (Doc. Ent. 2) is DENIED WITHOUT PREJUDICE to renewal if this case survives dispositive motion practice or if other circumstances warranting the appointment of counsel arise.

IT IS SO ORDERED.

The attention of the parties is drawn to Fed. R. Civ. P. 72(a), which provides a period of fourteen (14) days from the date of service of a copy of this order within which to file an appeal for consideration by the district judge under 28 U.S.C. § 636(b)(1).

Dated: September 17, 2014

s/Paul J. Komives
PAUL J. KOMIVES
UNITED STATES MAGISTRATE JUDGE

I hereby certify that a copy of the foregoing document was sent to parties of record on September 17, 2014, electronically and/or by U.S. Mail.

s/Michael Williams
Case Manager for the
Honorable Paul J. Komives